Bilateral Investment Treaties: Liberal Litmus Tests?

Introduction

Investment and capital flows are an important part of global market integration, but are particularly difficult to maneuver due to several technical, structural, and legal barriers to international investment. For example, Lane and Milesi-Ferretti find that bilateral investment equity is strongly correlated to both international trade flows and informational linkages.[1] One means of addressing these issues is through Bilateral Investment Treaties (BITs). Much of the current literature reinforces a liberal institutionalist view that BITs are economically beneficial to both parties because they decrease market frictions allowing for easier access to capital which increases market activity.[2] This line of logic lends itself to a heavy focus on before and after comparisons of investment flows and patterns of investment through econometric analysis of capital flows post implementation rather than a qualitative comparison of the goals and applications of such golas. The research design for this project will be a two step analysis as structured by the question: *What are the key barriers to international investment? How do bilateral investment treaties (BITs) address these issues?* After describing the intellectual background of BITs, and their global emergence, the paper will evaluate the major barriers to international investment as assessed by firms and/or financial service providers. Based on those findings, there will be a qualitative examination of the current clauses outlined in the American treaty model.

Describing BITs

Since Germany signed the first Bilateral Investment Treaty (BIT) with Pakistan in 1959, over 2,500 such treaties have been ratified, and over 1,900 are fully in force. In the original spirit of the Germany/Pakistan agreement, many modern BITs declare that "an understanding reached between two States is likely to promote investment, encourage private industrial and financial enterprise and to increase the prosperity of both the States."[3] These treaties are meant to specifically address investment barriers between specific countries. Although extremely prolific, and particularly important to the financial services

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[1] Philip R. Lane and Gian Maria Milesi-Ferretti, "International Investment Patterns," *The Review of Economics and Statistics*. August 2008, 90(3): 538-549.
[2] Kenneth J. Vandevelde, "The Political Economy of a Bilateral Investment Treaty," *American Society of International Law*. October 1998, 92(4): 627.
[3] Federico Ortino. "The Social Dimension of International Investment Agreements: Drafting a New BIT/MIT Model?." International Law FORUM du droit international 7 (2005): 243.

industry, these treaties have not received the same level of academic or popular consideration as free trade agreements. Much of the conversation surrounding BITs has focused solely on their one-dimensional quantitative outcome – whether they have successfully increased investment and capital flows between party countries. While this question is important, it does not address the full range of questions as to why countries continue to be party to these agreements.

Bilateral Investment Treaties are signed between two states and establish a common understanding of investor protection. They focus primarily on protecting foreign investors from discriminatory or otherwise unfair treatment. Model BITs describe measures for admission and treatment, transfers, key personnel, expropriation, and dispute settlement. While they may address other issues, ensuring the rights of foreign investors is the primary motivator for their enactment. In congruence with international law, BITs respect the most favored nation (MFN) treatment and international property law. However, not all BITs provide National Treatment (NT) for investors as the United States model does. While some of the issues addressed by BITs are redundant to prevailing international law, most BITs defer to the most favorable law for investors. They also provide dispute settlement mechanisms for state-to-state and investor-to-state disputes, which can result in some overlap with other international agreements. Both the United States model and the European model (as well as NAFTA and GATS) provide recourse to international means for settlement of investment disputes.[4] In addition, many BITs, including the model used by the United States, have provisions allowing for national security measures and other exceptions. These include laws that may affect exchange rate policy, which is seen as necessary for a sovereign state to control independently in most cases. The United States model explicitly states that "a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including… to ensure the integrity and stability of the financial system."[5] Therefore, BITs do not typically address foreign exchange or related financial services.

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[4] Organization for Economic Cooperation and Development. "Relationships between International Investment Agreements." Working Papers on International Investment Number 2004/1. May, 2004, 17.

[5] "USTR - US Model BIT." Office of the United States Trade Representative. 24 Feb. 2006. 9 Feb. 2009 <http://www.ustr.gov/Trade_Agreements/BIT/Summary_of_US_Bilateral_Investment_Treaty_(BIT)_Program.html>.

There is some indication that BITs are negotiated based on the gap in relative power between signatories. Some countries have adopted "model BITs" which they use as a starting point for negotiations with other countries. These countries include the United States, the United Kingdom, Canada, and China, all of whom have high levels of economic power. According to the OECD, "most BITs have been concluded between developed capital exporting countries and developing capital importing countries."[6] In fact, Vandevelde argues that BITs are not neutral instruments, but instead, "they guarantee no right of access for capital or persons to the host state, they leave the home state with unlimited discretion to prohibit or regulate outward investment flows, the obligation of the host state not to discriminate applies only after investment is established, and the post-establishment of obligation of nondiscrimination on the part of the host state is subject to important qualifications."[7] Indeed he finds that BITs do little to change the system's favor, but maintain the status quo of favoring capital intensive nations.

Furthermore, the emergence of BITs themselves can be seen as a collective affirmation of a specific set of liberal economic values in line with western economic ideology. The goals of BITs are very liberal: creation of favorable conditions for investment with the goal of increased prosperity. In the documents, the relationship between these goals is given as fact, even though it is a theory. Vandevelde notes that through the 1960s, BITs were signed at a relatively low annual rate of eight per year. During the 1970s, however, while debates centered on the compensation required by customary international law were at their peak, the pace increased. "Developed states proposed the negotiation of BITs providing for prompt, adequate and effective compensation for expropriation."[8] And finally, in the 1990s, after the fall of the USSR, and during the era of the "triumph of capitalism" there was an explosion of BITs being signed. Between 1990 and 2002 the cumulative number of BITs signed more than quadrupled. In this manner, BITs are a symbol of a country's commitment to economic liberalism.

[6] OECD, 10.
[7] Vandevelde, 630.
[8] Vandevelde, 627.

Table 1: Regional statistics

Region	Average BITs/country	Percent of countries in region with BIT(s)
Africa	15	96%
Americas	20	71%
Asia	34	90%
Europe	56	81%
Oceania	8	24%
Grand Total	30	81%

The emergence of BITs provides policymakers and scholars with an interesting case in the development of a global economic regime. BITs exist outside the structure of a specific international organization or multilateral agreement. They are consequently capable of being more versatile, and more prolific. Countries with similar domestic preferences and capital structures would be able to use BITs to coordinate investment. More importantly, we see that BITs are an expression of economic liberalism between countries. While there is a great deal of overlap between the tenants of BITs and other agreements such as International Investment Agreements (IIAs), OECD Codes of Liberalization, and NAFTA to name a few, BITs can be viewed as a means of form communication between countries. Signing a BITs is a measure of goodwill and expression of liberal preference between countries, regardless of whether or not it is a means of achieving its stated goals. As more countries became more economically liberal during the 1990s and began adopting liberal economic policies, they turned to BITs to integrate themselves into the system. While academic evidence is inconclusive on the value added of these treaties, politically they send a clear message of economic openness. Even countries such as China, which is not economically free, can utilize these agreements to send a message of liberal economic policy.

US BIT analysis

According to the Office of the United States Trade Representative, US BITs provide investments with six core benefits:

1. The BIT generally affords the better of national treatment or most-favored-nation treatment for the full life-cycle of investment – from establishment or acquisition, through management, operation, and expansion, to disposition

2. BITs establish clear limits on the expropriation of investments and provide for payment of prompt, adequate, and effective compensation when expropriation takes place.
3. BITs provide for the transferability of investment-related funds into and out of a host country without delay and using a market rate of exchange
4. BITs restrict the imposition of performance requirements, such as local content targets or export quotas, as a condition for the establishment, acquisition, expansion, management, conduct, or operation of an investment
5. BITs give covered investments the right to engage the top managerial personnel of their choice, regardless of nationality
6. BITs give investors from each party the right to submit an investment dispute with the government of the other party to international arbitration. There is no requirement to use that country's domestic courts[9]

These benefits fall under an open-market philosophy, and adhere to economic liberalism. The specific clauses of the US model clearly reflect these stated policies, but a more critical analysis reveals that these policies also promote the interests of American investors. It is important to note that these treaties are typically negotiated between capital importing and capital exporting countries (i.e. developing and developed countries respectively). Although theoretically the treaty seems to address a two-way flow of capital between countries equally, in reality negotiations and outcomes are unequal. According to Sornarajah "there is an insufficient *quid pro quo* in that the two-way flow that is openly stated as the basis of the treaties is often a fiction. There are interesting problems that arise as a result of this inequality of bargaining power."[10] This fact is central to the difficulty of assessing the clauses of an investment treaty. Therefore, the assessment will have to take a dualistic approach whereby there is a qualitative judgment of liberalness and a more normative analysis of fairness of the BIT. This provides room for future research into the effects of BITs which are not addressed by this study.

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[9] "USTR - Summary of U.S. Bilateral Investment Treaty (BIT) Program." Office of the United States Trade Representative. http://www.ustr.gov/Trade_Agreements/BIT/Summary_of_US_Bilateral_Investment_Treaty_(BIT)_Program.html (accessed February 1, 2009).

[10] M. Sornarajah, "The international law on foreign investment" Cambridge University Press, 2004, 2nd ed. 207.

Table 2: Comparison of states with most signed BITs and their average relative power measured by GDP[11]

Countries with most BITs	(number signed)	Countries with largest average difference in GDP to co-signatory
Germany	135	**United States**
China	121	Japan
Switzerland	114	**Germany**
United Kingdom	103	**France**
Egypt	100	**Italy**
Italy	100	**United Kingdom**
France	99	Canada
Netherlands	95	**China**
Belgium	88	Spain
Republic of Korea	87	**Netherlands**

Given that the BIT is a gesture of economic liberalism, analysis will now turn to an assessment of the specific adherence of model BITs to liberal investment prescriptions. Aboubaker Seddik Meziani provides a ranking of investment barriers through the use of an analytic hierarchy process which is particularly useful due to the fact that it is an expert-driven survey system. His 25 page survey was distributed to a randomly selected group from the 1999 Money Market Directory of Pension Funds and their Investment Managers. From this survey, he concluded that there were seven factors which were crucial international investment barriers:[12] While this survey focuses on a specific group, it was given to individuals in a decision-making role, and provides an inclusive list of concerns commonly cited among the investment community. This paper will assess the micro and macro barriers which could be affected through an investment treaty.

A. Exchange risk

Exchange risk was found to be the most important barrier to international investors; however, the US model BIT does little to protect investors against the risk of currency fluctuation. The only clauses discussing currency stipulate expropriation to be according to

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[11] This was calculated by averaging the GDP of all countries between 1970 and 2007, taking the difference between the average GDPs of two co-signatory countries, summing the difference, and averaging that difference by the number of signed treaties. This gives a generalized idea of the difference in bargaining power between countries, assuming that larger GDP is associated with a stronger capital market.

[12] Aboubaker Seddik Mezianai, "Assessing the Effect of Investment Barriers on International Capital Flows Using an Expert-Driven System," *Multinational Business Review*. Fall 2003, 11(2): 49-73.

"fair market value… denominated in a freely usable currency."[13] For those cases where it is not freely usable currency, currency exchange will be necessary at the market rate of exchange or at a later date with interest accrued since the date of expropriation. While this will provide legal security for investors, it will not further incentivize cross-border transactions as currency exposure is a large source of risk for both investors and governments. In addition, this clause indicates that the responsibility of currency exchange lies in the hands of the receivers of investment capital, rather than the investors.

B. *Political risk*

Political risk in this case refers specifically to expropriation of assets and the repatriations of profits. In both cases, the BIT provides policies which support and protect business interests. Explicitly put, "neither Party may expropriate or nationalize a covered investment either directly or indirectly."[14] Furthermore, transfers are protected across borders, meaning that investments under the treaty should not face problems associated with the repatriation of profits. Regardless of the position of the country, this protection is fundamental to the establishment of secure investments.

C. *Legal restrictions*

International law on foreign investment among developed countries typically follows a *minimum standard of treatment* which applies to the treatment of aliens. In some cases, this could result in better treatment that domestic investors would find, and many developing countries find these standards difficult to implement.[15] Some interpret this as a means of developing countries from precluding others from participation in investment. Regardless of the rationale, it serves as an impediment for many countries. It is therefore debatable whether or not the effect of this clause is towards openness when applied to all countries. However, it does fall under a larger standard of liberalization which applies to non-discrimination.

The US model also prohibits performance requirements from being tied to investment, which means that quotas cannot be tied to protected investment arrangements. This is a very important policy as it ensures that governments have less leverage over

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[13] USTR, US Model BIT
[14] Ibid.
[15] Sornarajah, 210.

implementing capital controls, tariffs, and non-tariff barriers, all of which are recognized as anti-liberal policies.

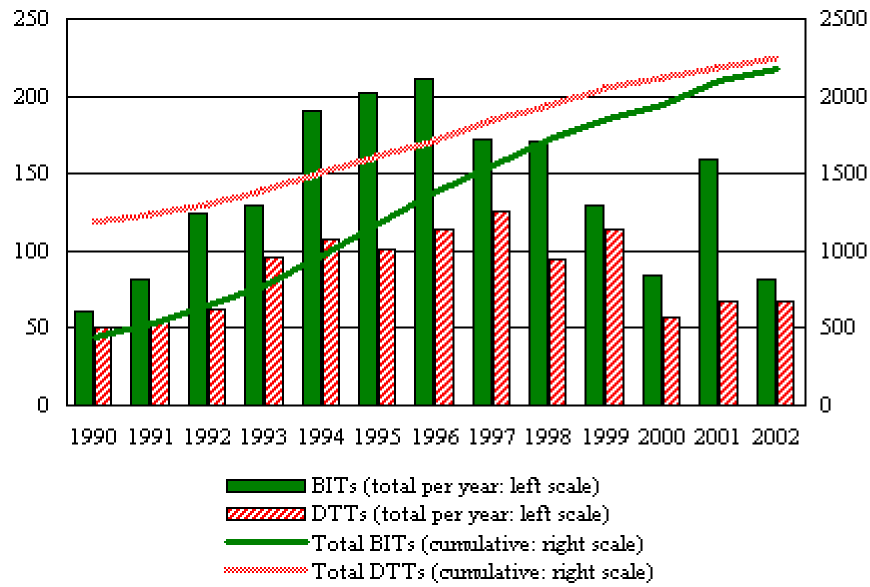
D. *Liquidity risk*

This is seen as a key issue in emerging market countries where liquidity for dollar denominated debt is lower that other areas. The fact that the BIT calls for exchanges to be denominated in freely tradable currency means that this liquidity risk is diminished for countries with strong currencies, but increased for those countries with weak currencies. This is generally the case for international investments, but given the fact that countries with strong currencies are typically capital rich. Diminishing the liquidity risk for these countries will encourage them to invest in emerging market countries.

E. *Discriminatory taxation*

The US model only briefly discusses taxation, and does not establish any derivation from the status-quo. This is reflected by the clause stating that "nothing in this Treaty shall affect the rights and obligations of either Party under any tax convention." However, Double Taxation Treaties (DTTs) have been widely adopted alongside BITs and at approximately the same rate. These treaties are seen as very beneficial to international investment flows, and more comprehensively address issues of international taxation policy.

Number of BITs and DTTs concluded per year and cumulative 1990-2002



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F. *Micro barriers: language, information, transaction costs*

According to the study by Meziani, these barriers existed, but resulted in a minimal impact on investment decisions. Therefore, it is not surprising that the US model BIT does not address these issues.

G. *Other*

The US model treaty addresses environmental and labor issues, which falls outside the strict business concerns associated with international investment. These clauses clearly display an adherence to the preferences of the United States. These are issues which the American polity has decided are important and voted on protecting. However, voters in developing countries are typically not concerned with these issues, and thus the governments will not prioritize regulatory policy focusing on the environment for example. The official position of the US government is that they will be at a disadvantage if they open markets to compete with areas that do not have the same standards, and the government uses this to justify closed trade and investment internationally. Naturally, in order to serve its best economic interests, the US model provides protection for these laws which it must uphold for itself.

Other Treaties

[16] UNCTAD. "UNCTAD.ORG >> Country Lists of BITs." UNCTAD.ORG >> Home. 16 Feb. 2009 <http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1>.

BITs are naturally very diverse as they are not centralized through a specific multilateral organization, and they are negotiated between a variety of states with a variety of needs. However, there are some key similarities and differences between the treaties. Table 3 summarizes the key clauses in several International Investment Agreements (IIAs). In this table, the OECD provides a comparison of the US and European model BITs, inter-regional agreements and multilateral agreements, the table offers some important information.

MAIN ELEMENTS/OVERLAPPING PROVISIONS BETWEEN INTERNATIONAL INVESTMENT AGREEMENTS

	Bilateral agreements		Inter-regional agreements		Regional/Economic integration agreements		Multilateral agreements		
	US model	**European model**	**OECD CCM**	**OECD Declaration**	**Energy Charter Treaty**	**NAFTA**	**GATS**	**TRIMS**	**TRIPS**
Legally binding	x	x	x	Only decisions	x	x	x	x	x
Definition of FDI									
a) Investment	Every kind of investment	Every kind of asset	All capital movement operations which give the possibility of exercising an effective influence on the management (OECD FDI benchmark definition)		Every kind of asset owned or controlled directly or indirectly by an investor	Every kind of asset except debt securities of loans to a State enterprise	Any service in any sector except services supplied in the exercise of governmental authority		All categories of intellectual property referred in the Agreement
b) Investor	A national or company	A national or company	A non-resident	Foreign-controlled enterprises	A national or company	A national or company	Service supplier (a national or company)		Natural or legal persons
Entry and establishment	x		x	x	x	x	x		
Standards of treatment									
a) National Treatment	x	Most, not all		x	x	x	x (scheduled)		x
b) Most favoured nation treatment (MFN)	x	x	x	x	x	x	x	x	x
Exceptions to MFN									
– Econ. Integration	x (not all)	x	x				x		
– Reciprocity		x	x (Annex E)	x					
– International agreements	x	x	x			x		x	
– Country exceptions	x	x	x		x	x			
– Exemptions to MFN			x				x		
c) Fair and equitable treatment	x	x	x	x	x	x			x
Transfer of funds	x	x	x		x	x			
Protection standards									
a) Minimum international standard of protection	x	x		x	x	x			
b) Expropriation	x	x			x	x			
c) Recourse to international means for disputes	x	x			x	x	x		
Transparency	Some		x	x	x	x	x	x	x
Incentives				x	x		x	x	

M. Houde, and K. Yannaca-Small, "Relationships between International Investment Agreements." Organization for Economic Cooperation and Development. Working Papers on International Investment Number 2004/1. May, 2004, 17.

The BIT models, by their nature, provide the most flexibility in their terms. However, this is at the expense of transparency and incentives clauses, which could be better regulated through multilateral or inter-regional body with membership agreements and a functioning, funded bureaucracy. The table also shows that there is not a wide variety of difference between the two types of models in terms of their general stipulations.

Enforcement

One of the largest problems for international regimes is the issue of enforcement. The US model implements the International Center for Settlement of Investment Disputes (ICSID) under the World Bank. The ICSID was created in 1966 in response to a growing number of international investments and the need for an arbitrator. Parties are not automatically under the jurisdiction of the ICSID, but consent is given either by the individual parties, the host state, or an agreement between the host state and the state of origin as is the case with BITs. This enforcement mechanism is not without contention, however. There have been cases of countries retracting their consent in frustration with the system.[17] As seen above, both models of BITs allow for disputes to be deferred to an international body. It is, however, more likely that developing countries such as Bolivia would be the ones to feel disenfranchised by the arrangement, and revamp their agreements, especially under socialist leadership. This would be the case regardless of if the outcomes were unfair, or simply perceived as unfair by a developing country.

Conclusions

BITs are liberal documents expressing openness to liberal standards of investment. Their popularity can largely be explained by (1) their flexibility and adaptability to the specific needs of the co-signatory countries, and (2) the widespread international adoption of a capitalist philosophy during the 1990s. While they come in many different flavors, BITs as a whole adhere to similar standards and norms, indicating a global movement towards investment convention. Furthermore, on whole, model treaties also adhere to liberalization as demonstrated by their attempts to correct the expert-defined barriers to international investment. However, this research also reveals that a focus on investor's opinions and preferences will tend to marginalize the subject of their investment. The fact that the clauses

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[17] Damon Vis-Dunbar, Luke Eric Peterson and Fernando Cabrera Diaz, "Bolivia notifies World Bank of withdrawal from ICSID, pursues BIT revisions," International Institute for Sustainable Development. *Investment Treaty News*, 9 May 2007.

of the treaties are centered on investor's exchange risk, for example, secures the position of investors, thereby inherently precluding a discussion on the exchange risk felt by emerging market countries. The legal restrictions requiring a minimum standard of treatment could require countries to provide better access to foreign investors than domestic investors. In addition, the United States also requires labor and environmental standards which are unlikely to exist at the same level in developing countries. These issues reflect a difference in bargaining capacity, and are also seen in multinational arrangements.

This research serves to show the theoretical underpinnings of BITs. It also provides an analysis based on the manifestations of these theories as investment standards, both of which indicate a genuinely liberal philosophy. However, in order to fully understand the nature of these treaties, it is important to recognize the balance of power which lies behind their development and influences their focus. Just as there can be non-tariff barriers for trade in goods, there can also be subtle non-investment-specific barriers to international capital flows.

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